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In the Supreme Court of the United States

OCTOBER TERM, 1979

WINSTON EUGENE DAYTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals on rehearing en banc (Pet. App. 21-51) is reported at 604 F. 2d 931. The panel opinion of the court of appeals (Pet. App. 54-59) is reported at 592 F. 2d 253.

JURISDICTION

The judgment of the court of appeals on rehearing en banc was entered on October 18, 1979. A petition for rehearing was denied on November 16, 1979 (Pet. App. 52-53). The petition for a writ of certiorari was filed on Monday, December 17, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner is entitled to vacation of his guilty plea.

STATEMENT

Following indictment in the United States District Court for the Western District of Texas, petitioner pleaded guilty to two counts (Counts 19 and 28) of possessing with intent to distribute a total of 1600 pounds of marijuana, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of three years' imprisonment, to be followed by a special parole term of 10 years (Pet. App. 66). The court of appeals, sitting en banc, affirmed (*id.* at 21-51).

1. At the plea proceeding required by Fed. R. Crim. P. 11, the court read to petitioner the charges on Counts 19 and 28 (Tr. 26-28):

> That on or about August 15, 1976, in the Western District of Texas, Defendants Louis Henry Krueger, John Morgan Flanagan, Bob David Jack, Winston Eugene Dayton, Donald Lewis Holeman and Arthur Stout did unlawfully, knowingly and intentionally possess with intent to distribute approximately six hundred pounds of marihuana, a Schedule I Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).
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> * * * * *
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> That on or about December 7, 1976, in the Western District of Texas, Defendants Bob David Jack, Donald Lewis Holeman and Winston Eugene Dayton, did unlawfully, knowingly and intentionally possess with intent to distribute approximately one thousand pounds of marihuana, a Schedule I Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

The court then addressed petitioner as follows (Pet. App. 36):

> THE COURT: All right. Mr. Dayton, do you understand the nature of the charges that have been made against you in Counts 19 and 28?
>
> MR. DAYTON: Yes, sir.
>
> THE COURT: Mr. Dayton, any question about it?
>
> MR. DAYTON: No, sir.

Later in the plea proceeding, and after the court had admonished the defendants (including petitioner) "to listen to the facts upon which the Government relies to convict you * * *. * * * I want to know if they can prove these facts against you beyond a reasonable doubt," the prosecutor set forth the following facts underlying the charges (Tr. 55-57):

> With regards to Count 19 of the indictment concerning Mr. Donald Lewis Holeman, Mr. Winston Eugene Dayton, Mr. Bob David Jack, it is alleged in the indictment that on or around August 15, the actual date was on or around September 5th to September 12th, 1976, Bob David Jack arranged for a load of marihuana to be smuggled into the United States from the Republic of Mexico.
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> A load of marihuana was subsequently smuggled by Thomas Kelly as the pilot. It landed at a ranch in the Western District of Texas in and around Llano, Texas, owned by Donald Lewis Holeman. It was flown in a plane owned by Donald Lewis Holeman and Defendant Louis Henry Krueger.
>
> The defendant, Winston Eugene Dayton, acted as a ground crew, helped unload the marihuana and transported it from the airstrip. Defendants

Holeman and Krueger received approximately ten thousand dollars on September 18th from John Morgan Flanagan and Arthur Stout at the Tom Ball Motor Company owned by Defendant Donald Lewis Holeman for their part in the transaction

* * * * *

With regards to Count 28 of the indictment, Your Honor, on [sic] Donald Lewis Holeman, Winston Eugene Dayton, on or about December 7, 1976, another load arranged by Bob David Jack wherein Defendant Winston Eugene Dayton acted as ground crew was flown from the Republic of Mexico into the United States by Thomas Kelly.

This load of marihuana also was flown into the Western District of Texas on an airstrip owned by Defendant Donald Lewis Holeman, for which he received consideration.

Thereafter, in response to questioning by the court, petitioner admitted that the prosecutor's statement of the facts was accurate (Tr. 58-59):

THE COURT: Now, each of you have heard the facts, that is the factual basis for which the Government relies to convict you as to the charges contained in each of the counts covered by the plea bargains or plea agreements.

Now, I will ask you, are these facts true and can they be proved against you beyond a reasonable doubt?

* * * * *

THE COURT: Mr. Dayton?

DEFENDANT DAYTON: Yes, Your Honor.

2. On direct appeal, petitioner sought vacation of his guilty plea on the ground that the district court had not determined that he understood the nature of the charges to which the plea was offered, as required by Fed. R. Crim. P. 11(c)(1), or that there was a factual basis for the plea, as required by Rule 11(f) (Pet. App. 35, 55). After a panel of the court of appeals had reversed petitioner's conviction (*id.* at 54-59), the court granted rehearing en banc and reinstated his guilty plea (*id.* at 21-51). All members of the en banc court agreed that no violation of Rule 11 had occurred (*id.* at 38-39, 46, 47). As explained in the dissent, the panel's reversal had been based on an incorrect transcript of the plea hearing; the corrected record "disclosed that the judge had determined [petitioner] understood the nature of the charge" (*id.* at 47; compare *id.* at 36 & n.15, with *id.* at 56).

Despite the lack of a Rule 11 violation, Judge Gee, writing for the majority, nevertheless addressed the question whether this Court's decision in *McCarthy* v. *United States*, 394 U.S. 459 (1969), requires automatic reversal of guilty pleas on direct appeal for technical, non-prejudicial violations of the present version of Rule 11.[1] The court concluded that automatic reversal was not

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[1]In 1975, Rule 11 was completely rewritten to its present form (Pet. 2-6). At the time of the *McCarthy* decision, Rule 11 read as follows:

> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The

warranted where there has been only a failure fully to comply with the "post-*McCarthy* additions to the rule" (Pet. App. 33) that are not directed to the three "core concerns" of the Rule—"absence of coercion, understanding of the accusation, and knowledge of the direct consequences of the plea" (*id.* at 31).

ARGUMENT

Petitioner asks the Court to grant certiorari in this case to resolve a conflict among the circuits concerning the standard of review of Rule 11 violations raised on direct appeal.[2] We acknowledge the existence of a

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court shall not enter a judgment upon a plea of guilty unless it is statisfied that there is a factual basis for the plea.

In *McCarthy*, the Court invoked its supervisory powers to hold that failure to conform to the requirements of Rule 11 as it then existed would result in automatic reversal of the conviction on direct appeal. In *United States* v. *Timmreck*, 441 U.S. 780 (1979), the Court held that a formal, technical violation of Rule 11 would not support a collateral attack on a guilty plea.

[2]The courts of appeals are divided on the question whether every violation of Rule 11 requires automatic reversal on direct appeal. The Eighth and Ninth Circuits have not adopted a standard of automatic reversal. See *United States* v. *Cammisano*, 599 F. 2d 851, 855 (8th Cir. 1979); *United States* v. *Scharf*, 551 F. 2d 1124, 1129-1130 (8th Cir.), cert. denied, 434 U.S. 824 (1977); *United States* v. *Lambros*, 544 F. 2d 962 (8th Cir. 1976), cert. denied, 430 U.S. 930 (1977); *United States* v. *Conrad*, 598 F. 2d 506 (9th Cir. 1979). On the other hand, some circuits have imposed an "automatic reversal" rule. See *United States* v. *Fels*, 599 F. 2d 142, 149 n.5 (7th Cir. 1979); *United States* v. *White*, 583 F. 2d 819, 824 (6th Cir. 1978); *United States* v. *Boone*, 543 F. 2d 1090, 1092 (4th Cir. 1976). The Second Circuit has taken conflicting positions on the issue. Compare *United States* v. *Michaelson*, 552 F. 2d 472 (2d Cir. 1977), and *United States* v. *Saft*, 558 F. 2d 1073 (2d Cir. 1977), with *United States* v. *Palter*, 575 F. 2d 1050 (2d Cir. 1978), and *United States* v. *Journet*, 544 F. 2d 633, 635 (2d Cir. 1976). The Third Circuit, sitting en banc, recently considered the issue, but was evenly

conflict that, in some future case, may warrant resolution by this Court.

This case, however, does not present a suitable occasion for the Court to consider the issue. Here, the petition fails to argue, let alone demonstrate, that a violation of Rule 11 occurred. Hence, petitioner's conviction and sentence will remain intact no matter how the conflict is resolved. Contrary to the "settled" principle "that federal courts may act only in the context of a justiciable case or controversy," *Benton* v. *Maryland*, 395 U.S. 784, 789 (1969); *Muskrat* v. *United States*, 219 U.S. 346 (1911), petitioner is simply "asking for an advisory opinion on an abstract or hypothetical question." *Benton* v. *Maryland*, *supra*, 395 U.S. at 788. This case thus lacks "that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult * * * questions." *United States* v. *Nixon*, 418 U.S. 683, 697 (1974), quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). Accordingly, this is an inappropriate case in which to resolve the Rule 11 question posed by petitioner.

In fact, as the en banc court of appeals unanimously concluded (Pet. App. 38-39, 46, 47), the record clearly shows that there was no Rule 11 violation. Petitioner contended in the court of appeals that he had not been apprised of the nature of the charges to which the plea was offered, as required by Rule 11(c)(1). However, at the plea hearing, the district court read the charges on

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divided and vacated and remanded without opinion. See *United States* v. *Altro*, 595 F. 2d 1214 (Table), cert. pending, No. 79-5892. Previously, the Third Circuit had followed the "automatic reversal" rule. See *United States* v. *Keller*, 594 F. 2d 939, 942 (3d Cir. 1979); but see *United States* v. *Dawkins*, 448 F. Supp. 1343 (E.D. Pa.), aff'd, 577 F. 2d 729 (3d Cir. 1978) (Table).

Counts 19 and 28, and petitioner stated that he understood the nature of these charges. Although a reading of the indictment may not always suffice to explain to a defendant the nature of the charge against him, it was plainly adequate in this case. Here, the charges were, as characterized by the court of appeals, "simple" (Pet. App. 38)—petitioner was alleged to have possessed, on a specific date in a given locale, a quantity of an identified drug with the intent to distribute it. In these circumstances, further elaboration was unnecessary. See *Seiller* v. *United States*, 544 F. 2d 554, 562-563 (2d Cir. 1975); *Paradiso* v. *United States*, 482 F. 2d 409 (3d Cir. 1973); see also *United States* v. *Coronado*, 554 F. 2d 166 (5th Cir.), cert. denied, 434 U.S. 870 (1977); *Bachner* v. *United States*, 517 F. 2d 589, 592-593 (7th Cir. 1975). Accordingly, the court of appeals correctly concluded that Rule 11(c)(1) had not been violated.

The record also refutes the contention made by petitioner in the court below that the district court failed to determine, as required by Rule 11(f), whether there was a factual basis for the plea. The prosecutor stated at the plea hearing that on two specified occasions petitioner helped unload an airplane containing marijuana that had been smuggled into the United States from Mexico. In response to questioning by the court, petitioner admitted that the prosecutor's recitation of the facts was accurate. This procedure fully satisfied the requirement of Rule 11(f).

Hence, since the district court complied with Rule 11, this case presents an inappropriate vehicle for addressing the question whether automatic reversal of a guilty plea on direct appeal is currently required for all violations of Rule 11.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

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